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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL AHUMADA,

Defendant and Appellant.

B266094

(Los Angeles County
Super. Ct. No. GA091530)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cathryn F. Brougham, Judge. Affirmed in part, reversed in part, and remanded.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant Paul Ahumada.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Peggy Z. Huang, Deputy Attorney General, for Plaintiff and Respondent.

The jury convicted defendant and appellant Paul Ahumada of carjacking (Pen. Code, § 215, subd. (a))¹, nine counts of second degree robbery (§ 211), evading an officer (Veh. Code, § 2800.2, subd. (a)), and misdemeanor resisting, obstructing, or delaying a peace officer (§ 148, subd. (a)(1)).² The jury found that defendant personally used a firearm in the commission of the carjacking (§ 12022.53, subd. (b)) and that a principal used a firearm in commission of the carjacking and robberies (§ 12022, subd. (a)(1)). The jury also found defendant personally used a knife in commission of the robberies (§ 12022, subd. (b)(1)).

Defendant admitted that he had suffered a conviction for violating section 136.1, subdivision (c)(1) in case No. GA50800, which qualified as a prior conviction under the three strikes law (§§ 1170.12, subds. (a)-(d) and 667, subds. (b)-(i)), a serious felony (§ 667, subd. (a)), and a violent felony (§ 667.5, subd. (c)).³ The court sentenced defendant to a total of 51 years four months in state prison.

Defendant contends the trial court erred in imposing enhancements under both section 667, subdivision (a)(1), and 667.5, subdivision (b), because the enhancements were based on the same conviction in case No. GA50800. He also contends that the trial court erred in imposing concurrent sentences in the felony evading conviction in count 18 and the misdemeanor resisting arrest conviction in count 20, rather than staying the sentence in count 20 pursuant to section 654. The Attorney General concedes that the sentence imposed pursuant to section 667.5, subdivision (b), was unauthorized, but notes that the trial court failed to make any findings concerning the prior prison term allegations, and argues the cause be remanded to resolve those allegations.

¹ All further references are to the Penal Code unless otherwise indicated.

² A codefendant, Osman Yousaf Latif, is not a party to this appeal. Latif's appeal to this court was dismissed on January 21, 2016, pursuant to California Rules of Court, rule 8.360(c)(5)(A)(iii).

³ As discussed more fully below, the information alleged defendant had served two prior prison terms in case Nos. GA071530 and VA087072. (§ 667.5, subd. (b)). Those allegations were never litigated in the trial court.

We hold the one-year enhancement for a prior prison term must be reversed. The cause is remanded for further proceedings on the prior prison term allegations relating to case Nos. GA071530 and VA087072. In all other respects, the judgment is affirmed.

FACTS

On November 16, 2013, defendant and Osman Yousaf Latif committed a carjacking in which defendant held a gun to the driver's head, made him lie on the ground, and forced him to relinquish the keys to his Camry. Defendant and Latif then drove the Camry to the Wok Barbeque restaurant, where the couple who owned the restaurant and seven customers were present. Defendant was armed with a knife and Latif was carrying a gun, which he brandished to the occupants of the restaurant. Defendant and Latif ordered everyone to turn over their purses, wallets, and cell phones, which they put into a bag along with all of the cash from the register. They drove away in the stolen Camry.

The owner of a nearby shop took down the Camry's license plate number and provided it to the police. Officer Alan Pucciarelli spotted the Camry and began pursuit. The Camry was driven recklessly at high speed. After a half mile, the driver lost control of the Camry. It struck another vehicle and a concrete divider, and flipped onto the driver's side. When officers arrived, Latif raised his hands. Defendant kicked and punched the windshield. Officer Pucciarelli ordered defendant to stop moving. Officer Michael Lee, who was also on the scene, saw a pair of hands come out of the window and then go back inside the car. A moment later, defendant began kicking and punching again, knocking a hole in the windshield. Officer Lee pointed a shotgun at the hole and ordered defendant to exit the vehicle. Defendant crawled out of the Camry through the hole in the windshield, stood up, and looked at Officer Lee. When Officer Lee ordered him to get on the ground, defendant ran. Defendant was apprehended by another officer a few minutes later. A loaded handgun magazine fell out of Latif's pocket as he was

lifted out of the Camry by officers. Purses, wallets, cell phones, and money were found in and around the Camry, along with a gun magazine containing six bullets.

DISCUSSION

Section 667.5, Subdivision (b), and Prior Prison Terms Enhancements

The information alleged that defendant suffered two prior prison terms within the meaning of section 667.5, subdivision (b), based on case Nos. GA071530 and VA087072. Defendant did not admit these allegations, nor were they found true by the trial court. The only prior conviction admitted by defendant was as to case No. GA50800, but there was no prior prison term allegation relating to that case. At sentencing, the court imposed a one-year enhancement for a prior prison term.

Section 1158 provides: “Whenever the fact of a previous conviction of another offense is charged in an accusatory pleading, and the defendant is found guilty of the offense with which he is charged, the jury, or the judge if a jury trial is waived, must unless the answer of the defendant admits such previous conviction, find whether or not he has suffered such previous conviction. . . . If more than one previous conviction is charged a separate finding must be made as to each.” The trial court must either impose a consecutive sentence for a proven prior prison term, or order it stricken. (*People v. Williams* (1980) 103 Cal.App.3d 507, 519; *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1560-1561 (*Garcia*).) Where, as here, the trial court neglects to either orally impose or strike a prior prison term allegation, we remand for the court to exercise its discretion. (*Garcia, supra*, 167 Cal. App.4th at p. 1561.)

Defendant and the Attorney General assume the one-year enhancement pursuant to section 667.5, subdivision (b), was imposed under case No. GA50800, apparently because defendant admitted that prior conviction for purposes of the three strikes law and sections 667, subdivision (a), and 667.5, subdivision (c). Based on this assumption, defendant and the Attorney General agree defendant could not receive a one-year prior

prison term enhancement because defendant received a five-year enhancement for the same prior conviction pursuant to section 667, subdivision (a)(1). (*People v. Jones* (1993) 5 Cal.4th 1142, 1150, 1152-1153 [“when multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply”].) We agree the section 667.5, subdivision (b) enhancement must be reversed, but for slightly different reasons than those cited by the parties.

The record is clear that defendant did not admit to any prior prison term allegation. Neither of the two allegations were found true by the trial court. The one-year enhancement cannot stand because the only section 667.5, subdivision (b), allegations before the trial court remain unresolved. The prior prison term enhancement is reversed. The cause must be remanded for resolution of the section 667.5, subdivision (b), allegations based as to case Nos. GA071530 and VA087072.

Imposition of Concurrent Sentences in Counts 18 and 20

Section 654, subdivision (a), provides: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” “In *Neal v. State of California* (1960) 55 Cal.2d 11, this court construed the statute broadly: “Section 654 has been applied not only where there was but one ‘act’ in the ordinary sense . . . but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654.” [Citation.] [¶] Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.’ (*Id.* at p. 19.)” (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507

[italics omitted].) “If, however, the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citation.]’ [Citation.]” (*People v. Hairston* (2009) 174 Cal.App.4th 231, 240 (*Hairston*).)

“The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them.” (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312 (*Hutchins*).) “When a trial court sentences a defendant to separate terms without making an express finding the defendant entertained separate objectives, the trial court is deemed to have made an implied finding each offense had a separate objective.” (*People v. Islas* (2012) 210 Cal.App.4th 116, 129 (*Islas*).) “““We must ‘view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]’ [Citation.]” [Citation.]’ (*Hutchins, supra*, 90 Cal.App.4th at pp. 1312-1313.)” (*People v. Tarris* (2009) 180 Cal.App.4th 612, 626-627.)

Analysis

The jury convicted defendant of evading an officer in count 18 and misdemeanor resisting, delaying, or obstructing a peace officer in count 20. The trial court imposed a sentence of one year eight months in count 18, and a concurrent sentence of one year in count 20. After imposing sentence, the trial court explained its decision to impose the terms concurrently, stating: “[count 20 was] part of the whole transaction with count 18, with the evading. It was a continuous evading as to count 20.”

Defendant contends that the trial court erred in imposing concurrent sentences, because the court expressly found the crimes were part of an indivisible course of

conduct. He argues that the trial court's finding is supported by substantial evidence in the record establishing that he had the single objective of evading the officers. Defendant asserts the court was required to stay the lesser sentence in count 20 pursuant to section 654. The Attorney General contests defendant's interpretation of the court's statements, arguing that the court impliedly found that the course of conduct was divisible when it imposed separate sentences. She argues that defendant had time to reflect and renew his intent, and that his crimes placed different persons in danger. We agree with the Attorney General that the court's imposition of separate sentences implies that it found section 654 inapplicable. We conclude that section 654 does not require that the sentence imposed in count 20 be stayed, as substantial evidence supports the trial court's implied finding.

There is nothing in the court's statements to indicate that it believed the conduct in counts 18 and 20 was indivisible. The court made no express determination as to whether the course of conduct was divisible or indivisible. It simply stated that the counts occurred in the *same* course of conduct. This is often the case when the court is faced with the question of whether to stay a sentence under section 654. Because the court imposed separate sentences, and did not expressly find that the crimes were part of the same indivisible course of conduct, we conclude that it impliedly found section 654 inapplicable. (See *Islas, supra*, 210 Cal.App.4th at p. 129.)

Moreover, the trial court's implied finding was supported by substantial evidence in the record. The instant case is analogous to *Hairston, supra*, 174 Cal. App.4th 231. In *Hairston*, the defendant was convicted of one count of criminal threats enhanced for personal use of a handgun, and three counts of misdemeanor resisting arrest (§ 148, subd. (a)(1)) with respect to three separate officers. (*Hairston, supra*, 174 Cal.App.4th at p. 233.) He was sentenced to three one-year terms in county jail to be served concurrently with his term of thirteen years in prison. (*Ibid.*) The defendant first resisted arrest when a sheriff's deputy following his car activated the patrol car's lights. Although the deputy yelled for the defendant to stop, he ran around a building and disappeared. A second deputy arrived on the scene to assist and spotted the defendant

running through an apartment complex and jumping over a wall. He exited his vehicle, identified himself, and ordered the defendant to put his hands over his head, but the defendant jumped back over the wall and ran through the complex, resisting arrest a second time. The defendant then ran in the direction of a third deputy arriving on the scene in his vehicle. The deputy slammed on his brakes, got out of the car, and pointed a gun at the defendant, ordering him to stop. The defendant fled the third deputy as well. (*Id.* at pp. 236-237.) On appeal, he contended, as defendant here does, that he acted with the single objective of avoiding arrest by the officers. The appellate court held that punishment could be imposed for all three violations of section 148 because the “[d]efendant formed a new and independent intent with each officer he encountered.” (*Id.* at p. 240.)

Defendant’s conviction for evading an officer in count 18 was based on his evasion of Officer Pucciarelli, who pursued him in a vehicle. At that time defendant was still in possession of the stolen Camry and the property of the robbery victims. Officer Pucciarelli followed defendant at a distance because he had been advised that defendant and his cohort were armed and was concerned that they might shoot at his vehicle. Defendant drove recklessly during the pursuit, in areas with other motorists and pedestrians.

Defendant’s conviction for misdemeanor resisting, obstructing, or delaying an officer was based on his conduct after the stolen vehicle crashed, when he refused to obey Officer Lee’s order to get down on the ground, and then fled from the officer on foot. Defendant first kicked and punched at the windshield, but then appeared compliant when the officers ordered him to stop moving, briefly placing his hands outside of the window. Defendant soon resumed kicking and punching the windshield, but after exiting the Camry as instructed, he stood looking at Officer Lee. Defendant ran when Officer Lee ordered him to the ground, abandoning the stolen items.

The evidence is sufficient to support a reasonable inference that the incidents were separate in objective and distinct in conduct, placing different people in danger. In count 18, defendant placed Officer Pucciarelli, other motorists, and pedestrians in danger by

leading the officer in a reckless car chase through populated areas. Defendant made his getaway in the stolen vehicle with the other stolen items still in his possession. It would be reasonable to conclude he intended to evade arrest while retaining the fruits of his crimes. Count 20 occurred after the vehicle crashed. Defendant made an initial showing of compliance, and then kicked and punched his way out of the vehicle. After doing so, he did not initially run, but instead stood looking at Officer Lee before fleeing on foot and abandoning the stolen property. The court could reasonably conclude that defendant had time to reflect during the two separate instances when he temporarily complied with the officers' orders. His crime in count 20 placed all the officers at the scene in danger of the risks inherent in pursuing a suspected criminal. Substantial evidence supports the trial court's implied finding that section 654 did not apply to the facts of this case.

DISPOSITION

The one-year enhancement imposed pursuant to section 667.5, subdivision (b), is reversed. The cause is remanded for resolution of the prior prison term allegations in case Nos. GA071530 and VA087072. Upon completion of proceedings the trial court is to forward an amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

RAPHAEL, J. *

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.